

Nos. 21,296 and 22,183
United States Court of Appeals
For the Ninth Circuit

ANNA L. SANCHEZ,

Appellant,

vs.

KANO KAWAMURA,

Japanese Consulate, et al.,

Appellees.

APPELLANT'S OPENING BRIEF
ON CONSOLIDATED APPEALS

LEVY, DERoy, GEFNER & VAN BOURG,

By VICTOR J. VAN BOURG,

GEORGE DERoy,

45 Polk Street,

San Francisco, California 94102,

Attorneys for Appellant.

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JURISDICTION

This case is before the Court upon appeals from decisions of the United States District Court rendered on July 5, 1966, and May 1, 1967. The earlier decision of the District Court granted defendants' Motion to Dismiss on the basis that one year had run from the date of the accident, prior to the filing of the complaint; the second held that appellant had not shown cause for granting of relief under Federal Rule of Civil Procedure 60(b). The Federal Court has exclusive jurisdiction under 28 U.S.C. § 1351, because the defendant is vice consul of Japan.

STATEMENT OF FACTS

Appellant has previously filed a brief in No. 21296. The statement of facts therein is adopted and incorporated herein by reference. The following additional facts appear germane.

The appeal from the denial of the Motion to Set Aside the Judgment of Dismissal and for Leave to File an Amended Complaint has been docketed and filed under No. 22183. On motion of appellant, the two appeals have been consolidated.

The record of the trial court indicates that on February 16, 1966, Levy, DeRoy, Geffner & Van Bourg were substituted out as attorneys for plaintiff [and appellant] and McCarthy and Perillat were substituted in their place. Plaintiff was represented by McCarthy and Perillat thereafter, until on March 28, 1967, a notice of association of counsel was filed associating Levy, DeRoy, Geffner & Van Bourg as counsel for the purpose of presenting the Motion to Set Aside the Judgment of Dismissal and File Amended Complaint. The notice of said motion was also filed on March 28, 1967.

SPECIFICATION OF ERRORS RELIED UPON

Inadvertently, the specification of errors relied upon was omitted from appellant's opening brief filed in No. 21296. The following is a specification of errors relied upon in both of the consolidated matters.

- (1) The District Court erred in granting respondents' original motion to dismiss the complaint;
- (2) The District Court erred in failing to grant appellant's motion to set aside the judgment of dismissal;
- (3) The District Court erred in failing to permit the filing of the amended complaint.

SUMMARY OF ARGUMENT

A. The motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure was timely filed and was procedurally correct;

B. The motion for relief should have been granted; it was an abuse of discretion to fail to allow the filing of an amended complaint;

C. The proposed amended complaint states a cause of action, not barred by the statute of limitations;

D. Even on the basis of the original pleading, assuming the amended pleading is not allowed, laches should be applied in this case rather than the State statute of limitations.

ARGUMENT

The argument presented in appellant's opening brief, already on file herein, is adopted and incorporated by reference. The following additional argument relates only to the question of whether the

motion for relief under Rule 60(b) should have been granted.

In *Berry v. Pacific Sportfishing, Inc.*, CA 9, 372 Fed. 2d 213 (1967), this honorable Court considered a case which is apparently decisive of the merits of this appeal. Concededly, the procedural problems in the instant case are not covered by the *Berry* decision, but the substantive question appears to be.

In *Berry*, a wrongful death claim was filed in California Superior Court, arising out of a death on the high seas. The complaint in that case did not indicate that death occurred on the high seas. The answer did not raise the exclusive jurisdiction of the Federal Court under 46 U.S.C. 761.

Neither the answer nor the pre-trial statement of the defendants in that case raised the issue of jurisdiction. After the two year statute of limitations, under 46 U.S.C. 763, had run, proceedings were filed in the Federal District Court and an injunction was obtained against the prosecution in the State Court action. After the limitations period, the plaintiffs commenced proceedings in the District Court. The District Court entered a judgment dismissing the claim on the ground that it was barred by the two year limitations period, which ran out three days before the present action was commenced.

The similarity to our case is striking. The Court of Appeals, in a well reasoned decision, reversed and remanded the case, holding that the statute of limitations was tolled.

The Court said:

“Here, then, we have a case in which the California Court did have power to act in the sense, first, that appellant could file her complaint in that Court, second that the Court could bring the parties before it, and third, it could continue to act, as a Court of general jurisdiction, until it was asserted that it lacked jurisdiction and it determined the assertion was correct. The burden of asserting lack of jurisdiction was on appellees. Yet they never made the assertion. Meanwhile, the claim certainly had not been allowed to slumber until evidence had been lost, memories had faded and witnesses had disappeared. On the contrary, appellant had been pressing her suit, discovery had been had, pre-trial had been completed, and the case had been set for trial. We think that the California action accomplished the purpose as referred to in the Burnett case, and that the Statute of Limitations was tolled . . .”

372 Fed. 2d 213, 215.

It is respectfully submitted that no clearer assertion of appellant's position in the instant case could be made.

The final question is why leave to amend was not asked at the time of the dismissal, in July, 1966. The writer of this brief cannot answer. All he can say is that his firm was not in the case at that time, and therein lies the source of his problem [though not necessarily appellant's problem].

SUMMARY

For the reason set forth in both of appellant's opening briefs, it is respectfully submitted that if her action is allowed to die, on the basis of failing to overcome the bar of the statute of limitations, a manifest injustice will occur. Defendant had ample notice of the claim and took active part in the defense thereof before the statute of limitations had run. No damage is suffered by anyone, and a *just* result will be obtained, if the amended complaint is ordered filed, and plaintiff is allowed to go to trial on the merits of her case against the responsible tort-feasor. Otherwise her claim against him will be forever lost.

Dated, San Francisco, California,
November 27, 1967.

LEVY, DERoy, GEFNER & VAN BOURG,
By VICTOR J. VAN BOURG,
GEORGE DERoy,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 in the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR J. VAN BOURG.